Supreme Court, U.S.
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Nos. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda.,

Petitioners,

v.

United States of America,

Respondent.

Abuchaibe Hnos. Ltda.,

Petitioner,

v.

United States of America, and Banco Atlantico,

Respondents.

Comercial Samora Ltda.,

Petitioner,

v.

United States of America, and Banco Atlantico,

Respondents.

BEST AVAILABLE COPY

Industrias Marathon Ltda.,

Petitioners,

v.

United States of America, and Manufacturers Hanover Trust Company,

Respondents.

Manufacturera del Atlantico Ltda., and Manufacturas Internacionales Ltda.,

Petitioners,

v.

United States of America, and Manufacturers Hanover Trust Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT SUPPLEMENTAL BRIEF

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Petitioners Manufacturera Del Atlantico Ltda., Industrias Marathon Ltda., Abuchaibe Hnos. Ltda., Manufacturas International Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comerc-

ial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda. (hereinafter the "Atlantico Group"), file this joint supplemental brief to call the attention of the Supreme Court to the recent decision of the United States Court of Appeals for the Second Circuit in Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019 (2nd Cir. 1993) (hereinafter the "Intermediary Bank Case").

I. AS A RESULT OF THE SECOND CIRCUIT'S HOLDING IN THE INTERMEDIARY BANK CASE, THE ATLANTICO GROUP'S COUNTERCLAIM IN THE ALL FUNDS CASE AGAINST THE GOVERNMENT FOR VIOLATION OF 18 U.S.C. § 2701 ET AL., MUST BE REMANDED FOR FURTHER CONSIDERATION.

In the Intermediary Bank Case the Second Circuit remanded to the District

Court the claim against the Government under 18 U.S.C. § 2707(a), for alleged unauthorized access to electronic fund transfer communications; but refused to permit a civil action against Banco Atlantico and the Bank of New York (hereinafter "Intermediary Banks), based on Judge Weinstein's decision in Manufacturas International, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal pending, No. 92-7360 (2d Cir. 1992)(hereinafter the "Consolidated Bank Case")(App. A-6a).[1]

Apart from the Fifth Amendment due process challenges already raised in the Reply Brief as to the Second Circuit use of the Consolidated Bank Case as res

[1]"App. A- " references are to the section and page number in the attached Appendix.

judicata when it refuses to reinstate the pending appeal; the Atlantico Group now also argue that based on the holding in the Intermediary Bank Case (App. A-8a), their counterclaim against the Government in United States v. Johnny Daccarett, 801 F.Supp. 984, 6 F.3rd 37 (2d Cir. 1993) (hereinafter "All Funds Case") (App. 1b) under 18 U.S.C. § 2701 et al., must be remanded.

II. BECAUSE CONGRESS UNDER 18 U.S.C. § 2703(a), PLACED A HIGHER STANDARD OF PRIVACY FOR ELECTRONIC COMMUNICATION HELD IN COMPUTER STORAGE FOR LESS THAN 180, UPON REMAND THE "EXCLUSIONARY RULE" UNDER BOTH 18 U.S.C. §§ 2515 AND 2518(9) APPLIES IN THE ALL FUNDS CASE.

Since a parallel currency market has not existed in the United States since the Articles of Confederation were revoked by the enactment of the United States Constitution, the Government was successful in confusing the jury by al-

luding to past transfers to different claimants from the parallel currency market.

Because electronic communication messages stored by the Intermediary Banks in their capacity as electronic communication services for fewer than 180 days are intended to facilitate in transit communication, Congress provided the same level of privacy as it required for in transit communication, House Report No. 647, 99th Congress, 2nd Session, at page 68 (1986).[2]

Therefore, on the remand of the All Funds Case the Government must show that they obtained access to the Atlantico Group's electronic communications in

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[2]See §19.5, at p. 375, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991) (hereinafter The Law of Electronic Commerce").

transit or in computer storage by a warrant issued by a judge under the Federal Rules of Criminal Procedures pursuant to 28 U.S.C. § 2518 and 18 U.S.C. § 2703(a).

Otherwise all evidence of the Atlantico Group's previous receipt of funds from the parallel currency market must be excluded.[3]

The Government would not prevail when the All Funds Case is remanded because the Government's use of their access to previously transmitted electronic fund transfer communications which were in the Intermediary Banks computer storage for less than 180 days, and which were obtained without a war

[3]Atlantico Group still maintains that the Fourth Amendment exclusionary rule is also applicable in this in rem forfeiture action. See 18 U.S.C. § 2518(10)(c), and One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965), on remand 418 Pa. 457, 211 A.2d 536.

rant issued under the Federal Rules of Criminal Procedure, was the key element in obfuscating the fact that the Government had no evidence showing that each of the Atlantico Group's intercepted electronic fund transfer had no connection to any illegal activity (Claimants Trial Exhibits 4, 5, 6, 7).

CONCLUSION

The Supreme Court has now before it three cases which clearly bring into focus the actions of the Government and the Intermediary Banks to circumvent the provisions of Electronic Communications Privacy Act as mandated by Congress.

Thus this Petition seeks review of the Second Circuit's interpretation of this law enacted by Congress specifically to address the future legal and commer-

cial issues raised by the new technology of electronic data interchange.

Therefore, the Supreme Court has an opportunity before it to confirm the mandates of Congress as enacted in the Electronic Communication Privacy Act, regarding information technology which effect a comprehensive reformulations of the interrelationships for the future among law, government and international commerce.

Based on the above the Petition for writ of certiorari should be granted.

Respectfully submitted,

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